Supreme Court of the United States

OCTOBER TERM, 1948.

No. 179.

LILLIAN A. WEADE, FREDERICK M. WEADE and ROBERTA L. STINEMEYER,

Petitioners,

vs.

DICHMANN, WRIGHT & PUGH, INCORPORATED,

Respondent.

BRIEF OF PETITIONERS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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Opinions Below.

The opinion of the court below is reported in 168 Fed. (2d) 914; it is found in the record at R. 123.

Jurisdiction.

The jurisdiction of this court is invoked under 28 U. S. C. A. Section 1254 (1).

Questions Presented.

1. Where a suit is based on the negligence of the agent (Respondent) in failing to use due care in the selection of reliable employees on board ship, and in failing to arrange to protect passengers on the voyage, is it necessary to find

the general agent owner *pro hac vice* in control of the vessel in order to hold the agent liable for such negligence? Does the General Agency Agreement (R. 81) with the United States confer immunity on the general agent for such a tort?

2. Does the General Agency Agreement between Respondent and the United States give Respondent (general agent) immunity from suits brought by passengers for injuries caused by negligence of the general agent?

Statement.

The court below reversed judgments of $50,000 in favor of Mrs. Weade; $1,000 in favor of her husband; and $5,000 in favor of her companion, Mrs. Stinemeyer, growing out of the rape of Mrs. Weade, while a passenger on board the U. S. S. METEOR, by a member of the crew. The court below ordered judgment entered exonerating Respondent of liability. The basis of the court's opinion was its belief that this case was controlled by *Caldarola v. Eckert*, 332 U. S. 155 (R. 123-127).

Allegations of the Complaints:

In one complaint Lillian A. Weade and Frederick M. Weade, her husband, alleged that Mrs. Weade was a paid passenger on the S. S. METEOR, operated as a common carrier by Respondent from Old Point Comfort, Virginia, to Washington, D. C. The complaint alleges:

> "While sleeping aboard said vessel in said stateroom during the course of her passage from said Old Point Comfort, Virginia, to Washington, D. C., and as the result of the failure of the defendants to provide protection for sleeping passengers from the personal misconduct of its employees, and/or as a result of the failure of the defendants to use due care in the selection of reliable, competent and careful employees, and/or as a result of the failure of the defendants to

provide reasonable safeguards for the protection of passengers on said vessel, and/or as a result of the failure of the defendants to comply with applicable law under the circumstances then existing, the plaintiff, Lillian A. Weade, was assaulted, raped and injured by a negro employee of said defendants. As a result thereof plaintiff sustained serious permanent injuries" (R. 1).

In the same complaint the husband sued for the loss of services and society of his wife (R. 3).

The complaint of Mrs. Roberta L. Stinemeyer, who occupied the same stateroom with Mrs. Weade, is substantially similar (R. 6-8).

Respondent's Answer:

As to the Weade complaint, Respondent denied that it was a common carrier and set up the defense of the Agreement it had with the War Shipping Administration (R. 4). It admitted that under this agreement Respondent was to "procure and make available to the master for engagement by him the officers and men required by him to fill the complement of the vessel" (R. 5).

Respondent's answer to the Stinemeyer complaint set up substantially the same defenses (R. 8-10).

The Evidence.

As to the Rape and Conditions Aboard Ship:

So far as here pertinent the evidence shows that on the night of August 3, 1945, after purchasing tickets from Respondent (R. 22, 68), Mrs. Weade and Mrs. Stinemeyer boarded the METEOR at Old Point Comfort, Virginia and they thereupon became fare paying passengers and were assigned a stateroom (R. 23, 68). They retired at approximately 11:00 p. m., Mrs. Weade taking the lower berth and Mrs. Stinemeyer, the upper (R. 48, 52, 72). Between 3:00 a. m. and 3:30 a. m. Barnes, a negro, employed in the stew-

ard's department on board ship, entered the stateroom, assaulted and raped Mrs. Weade, and caused fright and shock to Mrs. Stinemeyer, who by fear and compulsion was forced to remain in the stateroom and witness the violation of Mrs. Weade (R. 123). The rape was an atrocious one, for which Barnes was later tried and executed (*Barnes v. State*, (Md.) 47 Atl. (2d) 50). Mrs. Weade was strangled to the point where blood was forced out of her eye-balls (R. 49, 51, 102-105; 124).

Although the Coast Guard regulations (R. 39, 109-110) required a suitable number of watchmen on *each* deck and although the vessel in question had *three* decks (R. 31, 37, 39), at the time the events were occurring there was only *one watchman* on duty, one Charles Adkins, and he was resting on a lounge in the interior of the vessel (R. 37-39, 76-81, 111-117).

The evidence showed that Barnes, the rapist, had a criminal record when he was engaged as cook (R. 28-29, 74). No investigation was made into his past criminal record or his habits and traits of character before respondent hired him (R. 57-60, 75-76, 106-107). Respondent admitted it was authorized not only to hire but to discharge crew members (R. 107).

Respondent also procured and retained in service an inexperienced, incapable watchman (R. 109, 111-116) whose real duties consisted of fixing slot machines on board the ship (R. 111-112). He sandwiched-in his duties as watchman with his slot machine activities and made hourly tours with interim rests on the studio couch (R. 111-116). Respondent procured this watchman knowing he held two positions on board and drew compensation from an outside (slot machine) source (R. 111), as well as from Respondent (R. 112), in violation of Coast Guard regulations (R. 110). The evidence showed Respondent failed

to procure and make available to the master for engagement by him the number of watchmen required by Coast Guard regulations for a vessel of the type of the S. S. METEOR (R. 38-40, 46, 110). Also Respondent failed in its duty to see to it that "company rules" with regard to drinking by crew members aboard ship were enforced (R. 41-42). Barnes, the rapist, had been drinking at the time of the rape (R. 41-42, 44, 72) and was roaming about the ship (R. 36, 41-42, 44, 70-72). Plaintiff's stateroom was on the galley, or boat deck (R. 32-33) where Barnes had no right to be (R. 30, 33, 36, 70-72). The evidence also showed Respondent put Petitioner in a stateroom on board that had no screen—apparently none of the staterooms had screens (R. 32, 36, 69-70, 78; Interrog. 14-16, 98, 100), (Stenog. Tr. pp. 55-56, 61) so that on a hot August night, with the temperature around 90° (R. 43, 123), the passengers were compelled to leave the stateroom door and the unscreened window open to let in air (R. 43, 47-48, 50-54, 123).

As to Respondent's Duty Under Its General Agency Agreement;

Under the General Agency Agreement (R. 81) the United States appointed Respondent its agent "to manage and conduct the business" of the vessel, which appointment Respondent accepted (Art. 1 & 2, R. 82). Under Article 3(a) it is the duty of the General Agent:

> (a) To maintain the vessel in such trade or service as the United States may direct, subject to its orders as to voyages, cargoes, etc., "and as to all matters connected with the use of the vessels; or in the absence of such orders, the General Agent shall follow reasonable commercial practices."
>
> (b) Collect all monies due the United States, etc.
>
> (c) Equip, victual, supply and maintain the vessel subject to such directions, orders, etc. as the United States may give.

(d) Procure the master who shall be an agent and employee of the United States and "shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel" (R. 82).

Article 3A(d) also provides that the "General Agent shall procure and make available to the master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent, through the usual channels and in accordance with the customary operations. * * *". The officers and members of the crew shall be subject only to the orders of the master (R. 82-83).

Under Article 3(B) the General Agent agreed, subject to the provisions of Articles 8 and 16, to perform its duties in an efficient manner and "exercise due diligence to protect and safeguard the interest of the United States in all respects and to avoid loss and damage of every nature to the United States" (R. 84).

Article 8, just referred to, provides that the United States shall procure insurance against all insurable risks whatsoever, including damage to persons or property. Under this article it is the duty of the United States to safeguard the General Agent from any damage on account of such risks and liabilities to the extent not fully covered by insurance (R. 87-88).

Under Article 16, just referred to, the United States agrees to indemnify the General Agent against all claims, including attorney's fees "whether or not the claim or demand be found to be valid", of whatever kind or nature and by whomsoever asserted "for injury to persons or property arising out of, or in any way connected with the operation or use of such vessels or the performance of the General Agent of any of the obligations hereunder, includ-

ing but not limited to any and all claims and demands by passengers * * * for damage for personal injury" (R. 91-92).

Article 14 places the duty of maintenance and repair upon the General Agent (R. 91) and requires the General Agent to "exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessel" (R. 91).

Part II of the General Agency agreement provides for the use of the vessel in the passenger service. It amends Article 3(a) by adding sub-section (f) which provides that the General Agent "shall arrange for the transportation of passengers when so directed, and issue or cause to be issued to such passengers, customary passenger tickets" (R. 95-96).

As to Respondent's Defense that United States Alone was Liable:

Respondent submitted in evidence its General Agency Agreement with the War Shipping Administration of the GAA 4-442 type, which is found in the record in its entirety (R. 81-96). This agreement was entered into with Respondent on January 9, 1943. The Respondent operated approximately 20 cargo vessels (R. 55) but did not enter upon passenger service under this agreement until June, 1945, when Part II of the Service Agreement was executed by the parties and the Respondent undertook the operation and management of two passenger vessels, the S. S. METEOR and the S. S. DISTRICT OF COLUMBIA (R. 55, 95-96). On this operation the Respondent took over the staff of the previous operator and owner of the S. S. DISTRICT OF COLUMBIA, the Norfolk & Washington Steamboat Company, with the exception of its three top executive officers, and proceeded to operate both vessels in

the Norfolk and Washington passenger service and as the President stated, "ran that line and directed its operation both in a general way and responsible for the details" (R. 105-106).

The general agent selected and appointed a master for the METEOR from among ship captains known to them, and procured and selected a crew to operate the vessel in the usual manner customary for the manning of such vessels (R. 56-58). It made no investigation of persons selected for the crew (R. 56, 59-60, 105-106). Its manner of selection of the crew members for this passenger vessel was the same as the method used for any other vessel operated by it in the cargo trade (R. 105-107). The record shows that as to the cook, Barnes, the Respondent not only procured the man to be hired by the master, but actually employed him on board ship (R. 74, Interrog. 2, 97, 99, 105-106). Further, Mr. Allen Smith, President of Respondent company, testified the Respondent deemed itself authorized not only to hire but to discharge employees aboard the vessel (R. 105-106). The record disclosed no rules, regulations or directions received by the general agent from the War Shipping Administration relative to the operation of this vessel in the passenger trade. Testimony does show that the captain and crew looked to the Respondent for orders and instructions (R. 42, 55, 106, 109, 112). Moneys received from operations were deposited in a special account under the name of "Dichmann, Wright & Pugh" (R. 61).

The general agent handled all matters relating to the booking of passengers and the assignment of staterooms and offered to the public passage for hire between Norfolk and Washington on the S. S. METEOR (R. 96, Interrog. 9, 97, 99).

Respondent's Motion for Directed Verdict and the Court's Charge to the Jury:

At the close of the plaintiff's testimony, Respondent moved for a directed verdict on the basis of the contract with the War Shipping Administration (R. 11), which motion was renewed at the close of the entire case (R. 12). Upon overruling the motion the court instructed the jury, as a matter of law, that the contract did not prevent Respondent from being held responsible for any act of negligence on its part that the jury might find (R. 14). The court further instructed the jury that Respondent was a common carrier and that it was under the duty of exercising the highest degree of care (R. 17-18). The court said:

> "This duty to exercise the highest degree of care extends to all acts of the carrier, the defendant in this case, in connection with transporting passengers and includes such provisions as are proper for providing safe accommodations, a suitable number of watchmen in all passenger quarters and on each deck, protection from danger or peril, *the selection of competent, careful and* sober employees, and all other details relating to the operation of a common carrier of passengers such as the one here involved" (R. 18; Italics ours).

Respondent's Exception to the Charge and Requests for Instructions:

Respondent excepted to the charge insofar as it failed to hold Respondent was exonerated by its contract with the Government, and also to the charge that Respondent was a common carrier (R. 19).

Respondent also requested an instruction that the S. S. METEOR was being operated by the United States under the contract, and that the United States was the employer of the man Barnes for whose acts it alone was responsible. These requested instructions were refused (R. 19-21).

Respondent's Motion to Set Aside Verdict and Enter Judgment for Respondent and the Court's Rule:

Respondent also moved to set aside the verdict and enter judgment for defendant (R. 21), which the court took under consideration and overruled (R. 24-26). In effect, the court held that *Caldarola v. Eckert*, 332 U. S. 155, was not controlling (R. 26). The court referred to *Hust v. Moore-McCormack Lines, Incorporated*, 328 U. S. 707 (R. 24), and held that "in the instant case the injuries were sustained as a result of negligence and misconduct on the part of those employed by the agent (R. 26).

Basis of the Decisions Below:

The Court of Appeals, without discussing any other questions, reversed solely on the basis of *Caldarola v. Eckert*, 332 U. S. 155, stating:

> "Dichmann is liable to the plaintiffs here if, *but only if*, we can read 'the contract so as to find the agents to be owners *pro hac vice* in possession and control of the vessel.' Mr. Justice Frankfurter, in *Caldarola v. Eckert*, 332 U. S. 155, 159." (Op. R. 125).

The court below adverted to the dissent by four justices in the *Caldarola* case, but held that it was not at liberty to decide what merit lay therein. The court did not discuss petitioners' theory of the case based on the negligence of the general agent *in procuring the crew*, and in failing to establish proper safeguards for the carriage of passengers (R. 126-127).

Specification of Errors to Be Relied On.

The court below erred:

1. In reversing the judgment of the District Court and directing that judgments be entered exonerating the Respondent Dichmann, Wright & Pugh, Inc. of liability.

2. In governing its decision by application of the decision of this court in *Caldarola v. Eckert, et al.*, 332 U. S. 155.

3. In failing to recognize Petitioners' theory of the case based upon the negligence of the general agent in procuring the crew and in failing to afford proper safeguards for the carriage of passengers.

Outline of Argument.

No theory of ownership *pro hac vice* is necessary to hold the General Agent liable where the suit is based on the negligence of the General Agent in failing to select proper crew members and in other ways to afford proper safeguards for plaintiff's trip. Respondent was not a mere ticket-seller whose liability was limited to guaranteeing the genuineness of the paste-board. Plaintiff, when she purchased her ticket from Respondent was entitled to believe that Respondent as a common carrier would carry her safely to her destination. Respondent's failure to do so because of its selection of improper crew members and failure otherwise to establish proper safeguards for Respondent's passage, amounts to negligence for which it can be held liable. *Caldarola v. Eckert*, 332 U. S. 155 is, therefore, not in point. Respondent is liable both under general tort law and under the provisions of the General Agency Agreement, which contemplates that the general agent should be liable to the public for its own negligence. Under the General Agency Agreement, the duty of Respondent to maintain the vessel in the passenger trade required Respondent to select proper crew members and otherwise to arrange for a safe passage by affording proper watchmen for the maintenance of discipline aboard ship. Under a War Shipping directive, discipline aboard ship was a duty of the General Agent. The totality of Respond-

ent's duties and activities makes it liable and if anything in *Caldarola v. Eckert, supra*, can be construed to destroy Respondent's liability under the State law, the case should be distinguished or overruled.

POINT 1.

No Theory of Ownership Pro Hac Vice Is Required to Hold Respondent Liable for Its Own Negligence.

The question of the liability of Respondent, as distinguished from the War Shipping Administration, for negligence in the procurement of members of the crew, was squarely presented by the Petition for Writ of Certiorari herein. Question 3, page 2, of our Petition stated:

> "Does the failure of the general agent * * * to use due care in the procurement of members of the crew, resulting in injury to passengers of said vessel, give rise to a common law action by the passengers against the general agent or is the exclusive remedy of the passenger a suit against the United States under the suits in Admiralty Act."

This was the theory of the suit. Paragraph 2 of the Complaint alleges:

> "* * * as the result of the failure of the defendants to provide protection for sleeping passengers from the personal misconduct of its employees, and/or as a result of the failure of the defendants to use due care in the selection of reliable, competent and careful employees, and/or as a result of the failure of the defendants to provide reasonable safeguards for the protection of passengers on said vessel, and/or as a result of the failure of the defendants to comply with applicable law under the circumstances then existing, the plaintiff, Lillian A. Weade, was assaulted, raped and injured by a negro employee of said defendants" (R. 2).

Article 2 A (d) of the General Agency Agreement with the War Shipping Administration provides:

"The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel" (R.).

Upon trial before a jury the evidence showed among other things that:

1. Jack Lester Barnes, a cook aboard the S. S. METEOR, had a criminal record (R. 28-29, 74).

2. The Respondent, in procuring Barnes as a member of the crew of the S. S. METEOR, made no investigation into his past criminal record or his habits and traits of character (R. 57-60, 75-76, 106-107).

3. That the Respondent procured and retained in service an inexperienced, incapable watchman who performed the duties of "fixer" of all slot machines on board and performed his duties as watchman by hourly tours and interim rest on the studio couch (R. 109, 111-116).

4. The general agent procured and retained in service the watchman Adkins knowing he held two positions on board and drew compensation from an outside source (R. 111), as well as from the Respondent (R. 112), in violation of Coast Guard rules and regulations (R. 110).

5. The general agent failed to procure and make available to the master for engagement by him the number of watchmen required by the Coast Guard rules and regulations for a vessel of the type of the S. S. METEOR (R. 38-40, 46, 110).

6. The general agent failed in its duty to see that its "company rules" with regard to drinking by crew members aboard the vessel was enforced (R. 41-42).

The above questions of negligence were submitted to the jury by the Trial Court (R. 18). The Trial Court held,

after verdict, that "the injuries were sustained as a result of negligence and misconduct on the part of those employed by the agent" (R. 26).

It is obvious that Respondent's negligence in the selection of improper crew members antedated the voyage and would exist whether Respondent was the owner *pro hac vice* or not. It would be on a parity with furnishing spoiled food for the voyage or sending out an unseaworthy ship, for which, under Article 16 (a) of the Agency Agreement and the law of Virginia, the agent would be responsible.

It is elementary that an agent is responsible for his own torts. As said in *Brady v. Roosevelt S. S. Co.*, 317 U. S. 575, 580:

> "The liability of an agent for his own negligence has long been imbedded in the law."

See also:

Sloan Shipyards v. U. S. Fleet. Corp., 258 U. S. 549, 567, 568.

Quinn v. Southgate Nelson Co., 121 F. (2d) 190, 191.

Shipping Board v. Greenwald, 16 F. (2d) 948.

Blumenthal v. U. S., 30 F. (2d) 247, 248.

Chiarello Bros. Co. v. Pedersen, 242 F. 482, 484.

Pennell v. H. O. L. C., 21 F. Supp. 497.

In *Inland Waterways Corp. v. Hardee*, 100 F. (2d) 678, 685, a case wherein the United States was the principal, the court said:

> "An agent is not excused from liability for his torts because he acted only as agent, whoever his principal may be."

POINT 2.

Caldarola v. Eckert Is Not in Point as to Negligence of the General Agent Unrelated to Control of the Vessel.

The court below based its decision squarely on the *Caldarola* case. It held that Respondent was liable:

> "if, *but only if*, we can read 'the contract so as to find the agents to be owners *pro hac vice* in possession and control of the vessel.', Mr. Justice Frankfurter in *Caldarola v. Eckert*, 332 U. S. 155, 159." (R. 125)

It seems self-evident that as to the second ground of negligence alleged in the Complaint (R. 2), "the failure of the defendant to use due care in the selection of reliable, competent and careful employees" there is no necessity that Respondent should be the owner *pro hac vice* of the vessel. It is the negligence of the *agent* which is actionable; the agent's liability is separate from and independent of that of the operators of the vessel. The situation is quite different from that in the Caldarola case wherein the stevedore employed by the Agent was injured by a defective boom which the court held it was the duty of the principal to maintain in good working order (*Caldarola* Opinion p. 156-7). The *Caldarola* case simply held that New York law required, in these circumstances, "possession and control" *i.e.* ownership *pro hac vice*, before the Agent could be held liable (*Caldarola* Op. p. 158-9). The *Caldarola* case also holds that the Agency contract requires, to give the stevedore the right to recover, the same sort of control required by New York law. As the court held there was no such possession or control it held there could be no recovery either (a) under New York law or (b) on the basis of the Agency Agreement construed under Federal law (*Caldarola* Op. p. 158-9; See also *S. R. A. Inc. v. Minn.*, 327 U. S. 558, 564).

Further, the *Caldarola* case involved a maritime tort (*Caldarola* Op. p. 157), the nature of which was deter-

minable under Federal law (*Robins Dry Dock Co. v. Dahl*, 266 U. S. 449), the only question for the State court being whether the Agent, under State law, could be held (*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149; *Riley v. Agwilines*, 296 N. Y. 402, 406; *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 383; *Caldarola v. Eckert*, 332 U. S. 155, 157-8). In the present case insofar as Petitioner's suit is based on the act of the Agent in furnishing unreliable and vicious crew members and inadequate protection to the passenger, the tort is not maritime but shore-side. Hence no control at all of the vessel, or ownership *pro hac vice*, during its voyage is required. As the present suit is based on diversity the simple question was presented below whether, under applicable State law, (*Erie R. Co. v. Tompkins*, 304 U. S. 64; *Hudson v. Moonier*, 304 U. S. 397) Petitioner was entitled to recover from the Agent for its negligence in furnishing a vicious crew member and retaining him as such when it admitted it was authorized to discharge him (R. 105-106) and for its other acts of negligence in picking the crew and failing to arrange to protect passengers on the voyage. The Trial Court held in the affirmative. The court below erroneously held, on the basis of the *Caldarola* case, that ownership *pro hac vice* was required to hold the Agent responsible for such a tort. It seems self-evident that the only question decided in the *Caldarola* case is irrelevant on this point. There is obviously no need for Petitioner to spell out ownership *pro hac vice* from the Agency contract if under general state tort law the agent is liable for its own negligence in procuring crew members and in failing to provide adequate protection.

POINT 3.

Though the Point May Not be Involved Here, the Agent Can Be Held For Negligence in Procuring Improper Crew Members.

Though, strictly speaking, we do not think the point is involved here, the decision below being based solely on the *Caldarola* case, there is ample authority for holding the Agent for negligence in procuring crew members. Respondent answered Interrogatory No. 9 as follows:

> "Interrogatory 9:
>
> "As agent for the War Shipping Administration, did you offer, to the public in general, passage from Norfolk to Washington on said METEOR on the night of August 3, 1945, subject to prepayment of established fares, provided said passenger was a law abiding citizen." (R. 97)
>
> "Answer of Respondent:
>
> "Yes, as Agents only." (R. 99)

The passenger ticket (R. 22) purchased by Petitioner and the Stateroom Card (R. 23) show that they were "Issued by Washington-Hampton Roads Line" and state on their face that Respondent was "Agent". The fact that they also state the Line was operated by the United States does not destroy the implied guaranty of the ticket seller.

Under these circumstances Respondent was a common carrier insofar as the public was concerned and required to exercise the highest degree of care in performing its duties. (58 C. J. p. 548 and cases cited). The Trial Court so instructed the jury (R. 16-17; 20-21). The fact that Respondent claimed, above, that it acted only as Agent is immaterial.

The respondent's answer to the question whether it offered plaintiff passage was:

> "Yes, as agents only."

Admittedly, then, the general agent was engaged in the business of a common carrier as agent. The general law is that one who conducts the business of a common carrier is himself to be regarded as a carrier and subject to the duties and liabilities incident to such a busines, *9 Am. Jur. p. 447, Sec. 35*, and because he performs his duties in connection with that business as agent for another is no reason why he is less a carrier, *Ibid., Sec. 36.*

Under the Service Agreement there can be no doubt that the general agent undertook to manage and conduct the business of the vessel and to maintain the vessel in such trade as the United States might direct. Further, it bound itself to arrange for the transportation of passengers when so directed and to issue passenger tickets. Under these provisions of its Service Agreement, the general agent maintained terminals, operated ticket offices, arranged for the loading and unloading of passengers, collection of fares, advertising of service, fares and schedules, provisioned the ship, maintained it and procured its crew of officers and men. All of these things are directly incident to and part of a transportation service, and the general public applied, in ordinary course of securing transportation for hire, to the facilities of the general agent; and, the general agent recognized that it was performing the services as a common carrier, at least as agent.

The defense that the carrier renders its service under contract and as agent for another and is not therefore bound by the incidents, obligations, duties and liabilities of a common carrier has been raised in a number of cases. In *U. S. v. Brooklyn Eastern District Terminal*, 249 U. S. 296, 39 S. Ct. 283, 63 L. Ed. 613, 16 A. L. R. 527 (1918), it was sought to hold the terminal company within the coverage of the Hours of Service Act. The terminal company defended on the ground that it was not a common carrier, that it

did not hold itself out as such, owned no cars for the transportation of freight but merely switching engines which it used to transport cars of others, that it filed no tariffs, had only 8 miles of track which served as connecting links with various rail and water carrier facilities, that it was *under contract and acted as agent* for 10 railroads and water carriers, and all monies received by it were accounted for to the contracting carriers. Mr. Justice Brandeis in his opinion held, nevertheless, that the terminal company was a common carrier and stated that the fact that it acted as agent in the performance of its services did not affect its status as a common carrier.

In *Union Stockyard & Transit Co. v. U. S.*, 308 U. S. 213, 84 L. Ed. 198 (1939), the Stockyard Co. sought to be relieved of certain I.C.C. regulations on the ground that it was not a common carrier and that it operated solely as agent under contract to various railroad companies, that it performed no rail services directly or indirectly, and merely provided loading, unloading and terminal facilities for livestock. The court, nevertheless, held the stockyard company was bound by the I. C. C. regulations and a common carrier even though it acted as agent of others in the rendition of its services. The character of service in relation to the public determines whether the service is a public one, and, a common carrier does not cease to be such merely because, in rendering service, it acts as agent of another.

In Re Rice, 83 App. D. C. . . . , 165 F. 2d 617 (1947), the court went so far as to hold the lessor of taxicab equipment, colors and facilities a common carrier subject to regulations by the Public Utilities Commission of the District of Columbia (and possibly the I. C. C. for purpose of interstate commerce) rather than regulations of the O. P. A. since he was engaged in the business of a common carrier and this despite the fact the entire operation and contact with the public was with the lessee of the taxicab. In the

Weade case, it is submitted, that Dichmann had much greater participation in the transportation of passengers in interstate commerce and was even under its contract with the Government charged to "arrange for the transportation of passengers".

It is submitted, therefore, that since the agent of a common carrier may itself be a common carrier, that it, too, is subject to the duty to passengers to furnish careful and skillful personnel, in whose protection and care passengers will be entrusted for safe transport. *Shoemaker v. Kingsbury*, 12 Wal. 369, 20 L. Ed. 432; *Stokes v. Saltonstall*, 13 Peters 181, 10 L. Ed. 115.

Sec. 79, Comment a, Restatement, Agency, states as to agents employed by an agent, such as the General Agent here, that the employing agent:

> "Is no more responsible for their conduct to third persons or to the principal than he is for the conduct of other agents of the principal, *unless he is negligent in their selection.*" (Italics ours)

The Government itself quoted the above with approval on p. 16 of its brief below and also at p. 14 in its brief as *amicus curiae* in *Caldarola v. Eckert*, in this court, No. 625, October Term 1946.

Under these circumstances Respondent is liable under the general law of negligence. A somewhat similar situation was before this Court last term in *Lillie v. Thompson, Trustee*, 332 U. S. 459-461-2, wherein this court reversed *per curiam*. A young woman was employed by a railroad as a telegraph operator in an isolated building in a railroad yard. Late at night she was attacked by an intruder. This court held the railroad should have foreseen this danger, saying:

> "That the foreseeable danger was from intentional or criminal conduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it."

The Court cited the *Restatement of Torts*, Sec. 302, *Comment n*, p. 822:

> "The actor's conduct may create a situation which affords an opportunity or temptation to third persons to commit more serious forms of misconducts. * * * The actor is required to anticipate and provide against all of these misconducts * * * in all of which it is immaterial * * * that the third persons misconduct is or is not criminal."

To the same effect is the *Restatement of Torts*, Sec. 302, *Comment i*, p. 819:

> "If the actor knows or should know that the safety of the situation which he has created depends upon the actions of a particular person or a particular class of persons, he is required to take into account their peculiar characteristics of inattention, carelessness, unskillfulness, or even recklessness or lawlessness if he knows or should know thereof." (Italics ours)

The *Restatement, Agency*, Sec. 350 states:

> "*Negligent Action.* An agent is subject to liability if by his acts, he creates an unreasonable risk of harm to the interests of others protected against negligent invasion."

The *Maryland Annotations* to Sec. 350, above quoted states that "The Maryland cases are in accord with the principles of this section" citing *Consol. Gas Co. v. Connor*, (Md.) 78 A. 725 and other cases. The *Virginia Annotations* are likewise in accord citing *Brown v. Parker*, 167 Va. 286; 189 S. E. 339, and other cases. Where the law of both States is in accord, the question of which applies is immaterial (*Egan Chevrolet Co. v. Bruner*, 102 F. (2d) 373, 375).

If the negligence of Respondent contributed to or had a share in Petitioner's injury it is no defense that another (the Principal) shared in the wrong (*Grand Trunk R. Co. v. Cummings*, 106 U. S. 700; *Carolina R. Co. v. Hill*, (Va.) 89 S. E. 902, 903. Where Respondent's negligence combined with an independent intervening cause, Respondent is liable.

(*Grey v. Kurn*, 137 S. W. (2d) 558; *State v. Haid*, 62 S. W. (2d) 400; *Harrison v. Kansas City Elec. Light Co.*, 93 S. W. 951; 38 *Am. Juris., Negligence*, p. 726, Sec. 60).

Under Maryland law, which was conceded applicable in the Trial Court and below, the Agent is liable. (*Consol. Gas Co. v. Connor*, 114 Md. 140, 78 Atl. 725, 729, 32 LRA (NS) 809, approved in *East Coast Fr. Lines v. Consol. Gas Co.* (Md.) 50 Atl. (2d) 246, 254-5; *Hartland v. Fox*, 79 Md. 514, 527; *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403, 418. *Consolidated Gas Co. v. Connor* (Md.) 78 Atl. 725, 729, above cited disposes of any claim that Respondent's negligence was non-feasance as distinguished from misfeasance, if this distinction can be said to have any lingering vitality. (See the able annotation on this point in a note to the leading case of *Emery Co. v. Am. Refrig. Co.*, 184 N. W. 750, 752, in 20 ALR 97, 99; see also *Mechem on Agency*, Sec. 1465-1472). In the present case it is clear Respondent actually did something in procuring Barnes, the rapist, and the other incompetent crew members as distinguished from mere non-feasance, within the meaning of Mr. Justice Gray's decision in the leading case of *Osborne v. Morgan*, 130 Mass. 102; 39 Am. Rep. 437. (See also *Franklin v. May Stores Co.*, 25 F. Supp. 735; *Kentucky-Tenn. Light Co. v. Nashville Co.*, 37 F. Supp. 728, 738.)

For various applications of the doctrine of the liability of agents to third parties see *Nashville R. Co. v. Price* (Tenn.), 148 S. W. 219, Pullman Company liable for selling wrong ticket; *Ill. Cent. R. Co. v. Foulks* (Ill.) 60 N. E. 890; *Eastin v. Texas R. Co.* (Tex.) agent liable for refusing to route cattle over shorter route; *Englert v. N. O. R. Co.* (La.) 54 So. 963, agent liable for obstructing track; *Mixon v. So. R. Co.*, (S. C.), 138 S. E. 45, Pullman Company liable; *James v. Marinship Co.* (Cal.), 25 Cal. (2d) 721, 160 A. L. R. 900; 916, agent not absolved through by-laws of union;

Thompson v. Portland Hotel Co., 239 S .W. 1090, hotel liable for assault of manager.

POINT 4.

The Agency Agreement Shows It Contemplates the General Agent Should be Liable to the Public for Its Negligence.

Further, Sec. 16 (a) of the Agency Agreement shows that it was contemplated that Respondent should be liable to members of the public for its negligence in performing the Agreement.

Section 16 (a) provides:

> "ARTICLE 16. (a) The United States shall indemnify, and hold harmless and defend the General Agent against any and all claims and demands (including costs and reasonable attorneys' fees in defending such claim or demand, whether or not the claim or demand be found to be valid) of whatsoever kind or nature and by whomsoever asserted for injury to persons or property arising out of or in any way connected with the operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder, including but not limited to any and all claims and demands by passengers, * * * and including but not limited to claims * * * for damages for personal injury * * *." (R. 91)

The above quotation shows that the agreement expressly contemplated the General Agent would be liable to passengers for personal injury (a) arising out of the operation or use of the vessel or (b) arising out of "the performance by the General Agent of any of its obligations hereunder"[1]

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[1] Respondent claimed below in its Reply Brief p. 11 that Sec. 16 (a) refers only to baseless or invalid suits. But a reading of Sec. 16 (a), particularly its reference to costs and attorneys' fees "whether or not the claim be found to be valid", shows it was intended to cover valid suits as well.

The guaranty is referred to in Eckert's Reply Brief p. 33, in *Caldarola v. Eckert*, No. 625, October Term 1946, as "all-embracing so far as the General Agent's own liabilities were concerned."

Compare the above quoted provision with the comparable section of the General Agency Agreement in *Hust v. Moore-McCormick Lines*, 328 U. S. 707, 732, footnote 41.

In this situation the *Restatement of Contracts*, Sec. 145 provides:

> "Sec 145. *Beneficiaries under Promises to the United States* * * *
>
> "A promisor bound to the United States * * * by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or failing to do so, unless, (a) an intention is manifested in the contract, as interpreted in the light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences."

See also *Illustration 3, Sec. 145.*

Under Maryland Law, conceded applicable below, Petitioner had a right to sue the Agent for breach of contract and the Agent is necessarily liable for its tort in the performance of the Contract (2 *Williston on Contracts*, Sec. 368, footnote 1, p. 1073, 1074; *Mackubin vs. Curtiss-Wright Co.*, 57 Atl. (2d) 318, 320-321; *Mackenzie v. Schorr*, 151 Md. 1, 133 Atl. 821; cf. *Filardo v. Foley Bros.*, 297 N. Y. 217, 225; *Aetna Life Ins. Co. v. Maxwell*, 89 F. (2d) 988, 993). That Respondent owed Petitioner a duty is clear under the authorities cited in *East Coast Lines v. Consol. Gas Co.* (Md.), 50 Atl. (2d) 246, 248, wherein *Consol. Gas. Co. v. Connor*, 114 Md. 140, 78 Atl. 725, 729, was cited with approval at p. 254. Under *Klaxon Co. v. Stentor Co.*, 313 U. S. 487, 496, Virginia law governs as to conflicts of law, namely as to what law is applicable to Petitioner's cause of action. Under that rule the Trial Court applied Maryland law, as the tort occurred in Maryland waters (R. 29), Interrog. 12, 99). (See *Barnes v. State*, (Md.), 47 Atl. (2d) 50;

Hudson v. Moonier, 304 U. S. 397). But whether under the *Restatement of Contracts*, Sec. 145, the beneficiary is deemed to sue in contract or tort, both Maryland and Virginia law are agreed as to his right to sue (Va.: See 2 *Williston on Contracts*, Sec. 368, footnote 1, p. 1076; cf. *Montgue Mfg. Co. v. Howes Co.*, 142 Va. 301; 128 S. E. 447; cf. *Egan Chevrolet Co. v. Bruner*, 102 F. (2d) 373, 375). Lastly, if the law of the place where the General Agency Agreement was made determines "the validity and effect of a promise with respect to the nature and extent of the duty" (*Mackubin v. Curtiss-Wright Co.*, (Md.), 57 Atl. (2d) 318, 321) then under the law of the District of Columbia, where the contract was made, Petitioner has the right to sue for Respondent's negligence (See U. S. cases cited in 2 *Williston on Contracts*, Sec. 368, p. 1073; cf. *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220; *Robins Drydock Co. v. Flint*, 275 U. S. 303. In *Caldarola v. Eckert*, 332 U. S. 155, 158, this court referred to the *Robins Drydock* case with the remark that "It is not claimed that an injured party has rights under the agency contract or that it created duties to third parties." The contrary is true here: rights *are* so claimed on the basis of Sec. 16 (a) of the General Agency Agreement and the general law of negligence announced in the *Restatement of the Law of Contracts*, Sec. 145, above quoted.

POINT 5.

The Circumstances of the Present Case Take it Outside the Doctrine of Caldarola v. Eckert.

We take it that this court in *Caldarola v. Eckert*, 332 U. S. 155, 159, did not intend to hold that under any and all circumstances the Agency Agreement prevented the agent being held liable for its own torts. Under the General

Agency Agreement (R. 102) the Respondent had a wide variety of duties for breach of which Section 16 A of the Agreement provides indemnity to the agent by the United States (R. 115). We do not feel nor do we believe the Government will contend that Respondent was a mere ticket-seller whose liability was limited to guaranteeing the genuineness of the pasteboard.

As already seen, Respondent admitted, in answer to petitioner's interrogatory, that it was a carrier, that it offered passage from Norfolk to Washington, to petitioners (R. Interrog. 9, 97, 99). Petitioners' ticket shows that it was "issued by Washington-Hampton Roads Line" by Respondent as General Passenger Agent (R. 22). Petitioners' stateroom card contains a similar statement (R. 23). Respondent, however, disclaims liability by claiming that it offered passage to petitioners "as agents only", (R. 99), and that the ticket shows on its face that the steamship line was operated by the War Shipping Administration.

In answer, we have already cited authorities to the effect that an agent is liable for its own torts, equally with the principal. In offering passage to petitioners, Respondent, as general agent, guaranteed the safety of the voyage if under its General Agency Agreement it had obligations with respect to the safety of the voyage.

We think such obligations flow from the general responsibility of carriers offering passage by ship to the public and also the very direct provisions of the agreement as interpreted and applied by Respondent (See *The R. Lanahan Jr.*, 43 F. (2d) 858, 862; *U. S. v. Shea*, 152 U. S. 178, 186; *The Charlotte*, 285 F. 84, Aff. 299 F. 595).

Article 3 A of the Agreement provides that Respondent shall

"(a) *maintain the vessels* in such trade or service as the United States may direct." (R. 103).

Article 3 A (c) provides that Respondent shall

"equip, victual, supply and *maintain the vessels.*" (R. 82)

Article 3 A (d) provides that the General Agent shall procure the members of the crew

"in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service." (R. 82)

The addendum to the Agreement, Part II, added July 30, 1945, provides for passenger service. It states that vessels are allocated by the United States to the General Agent "to conduct as agent of the United States" (R. 95). Section 3 A is amended to read that Respondent

"(f) shall arrange for the transportation of passengers." (R. 96)

To arrange for the transportation of passengers means something more than merely selling a passenger a ticket. A natural duty required Respondent in arranging for such transportation to see to it that the passengers were safely carried.

The responsibility of the General Agent for discipline aboard ship is shown by Directive No. 1 of the War Shipping Administration dated October 8, 1942, reading as follows:

"WAR SHIPPING ADMINISTRATION
Washington

October 8, 1942

DIRECTIVE NO. 1

To All General Agents and Agents of Vessels Owned by or Chartered to the War Shipping Administration

A frequent and most serious criticism of the American merchant marine has been the lack of discipline

aboard ship, both at sea and in foreign ports. The War Shipping Administration is alarmed that these conditions continue in the face of the present war situation. Lack of discipline and order aboard ship is intolerable. It cannot be allowed to continue.

The deterioration of the authority of the Master and licensed officers is the principal cause for the breakdown in discipline. It is essential that this authority be restored immediately and maintained.

All Masters have been instructed to report serious breaches of discipline to the operating agent of the War Shipping Administration subsequent to the commitment of the violation." (Italics ours; quoted from brief on certiorari of petitioner in *Caldarola v. Eckert*, #625, October Term 1946. Defendant's Exhibit 6.)

The object of Directive No. 1, above quoted, was to produce action by the Agent termed therein the "operating agent". The directive is made directly applicable to the Agent by reason of Article 2 of the General Agency Agreement, (R. 82), under which the General Agent undertakes to conduct the business in accordance with the "directions, orders or regulations" of the United States. Also, Directive No. 1, dated as it is October 8, 1942, shows a contemporaneous construction of the type of contract involved herein, GAA 4-4-42 (R. 81). Indeed the present contract dated January 9, 1943, must be deemed in point of law to have been entered into subject to the obligations of Directive No. 1 above quoted, relative to the Agent's responsibility for discipline and order aboard ship.

As we have seen, Respondent was entirely negligent on this score in respect to (a) selecting without investigation a cook (the rapist) with a criminal record (R. 28-29, 57-60, 75-76, 106-07); (b) procuring as watchman a person inexperienced and incapable whose main duty was to fix slot machines, his activities as watchman being limited to hourly tours and interim sleep (R. 111, 116); (c) the procuring of the watchman thus holding two positions and drawing compensation from an outside source, which was in viola-

tion of Coast Guard rules and regulations (R. 110-112); (d) in not procuring the required number of watchmen required by Coast Guard rules and regulations (R. 38-40, 46, 110); (e) in failing to see that "company rules" with regard to drinking by crew members were enforced (R. 41-42).

Allen Smith, President of the Respondent Company, testified it "ran the line and directed its operations, both in a general way and responsible for the details" (R. 105-106). He said that Respondent was "General Steamship Agents, operators" (R. 55) and that "they operated under Coast Guard regulations" (R. 109). He stated "they were paid for operating the line" (R. 66, 107). Barnes, the rapist, was directly employed by Mr. Bell of Respondent Company, not the United States, and hired on board the ship itself (R. 74). Mr. Smith, the Company's President, stated that he was not only authorized to hire but to discharge the employees of the vessel (R. 107) which implies a continual supervision over them. He said "if we found any man who did not perform his duty properly, we let him go without the slightest ceremony at all" (R. 106). If a man did not perform his duties, Respondent fired him (R. 107).

The Master of the ship looked to the Company for instructions, rules and regulations and was subservient to the Company (R. 42, 55, 106, 109, 112).

The watchman—slot machine fixer looked to the Respondent for instructions (R. 111-112).

Although the General Agency Agreement provides in Article 2 (R. 82) that the General Agent undertakes to "manage and conduct the business for the United States" in accordance with such directions, etc. as the latter may prescribe (R. 82), the War Shipping Administration gave no such directions outside of a direction for the handling of money, irrelevant here. The provision of the Agreement

in paragraph 3 A (d) that the Master should have "full control, responsibility and authority with respect to the navigation and management of the vessel" (R. 82-83) simply stated the general Maritime Law under which the Master has an overriding responsibility for "the management of the vessel"; *i. e.*, the ship itself when it is at sea. (*The Oregon*, 158 U. S. 186). Such a provision has no bearing on the legal responsibility of the General Agent, whose duties "to manage and conduct the business of the United States" are set forth in Article 2 (R. 82) and recognized by Article 16 A (R. 91) wherein the United States agrees to indemnify the General Agent for "injury to persons or property * * * arising out of or in any way connected with the operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder."

The totality of Respondent's duties[2] sharply distinguishes the present case from the Caldarola case wherein this Court held that under a provision in the contract that the Government "shall furnish and maintain in good working order all necessary equipment" (332 U. S. at page 156) there was no duty on the part of the agent to a stevedore unless it was in possession and control of the premises (*Caldarola* opinion, at page 158).

Respondent's road to escape on the ground that it was merely an "agent" of the United States is blocked by the fact that clearly under the Agreement it owed duties to passengers over and above the duty of a mere ticket-seller. As said in 9 American Jurisprudence, page 447: "A common

[2] See the enumeration of these duties in Petitioners' brief on the merits in *Caldarola v. Eckert*, No. 625, October Term 1946, p. 20-30; also Mr. Justice Douglas' concurring opinion in *Hust v. Moore-McCormick Lines*, 328 U. S. 707, 734, wherein concurred in by Mr. Justice Black, he states "the business of managing and operating the vessel was the business of the company." (p. 738)

carrier does not cease to be such merely because the services which it renders to the public are performed as agent for another."

If the general agent bound itself by contract exclusively to manage and conduct the business of the vessel, arrange for the transportation of passengers, equip, victual, supply and maintain the vessel, it created the risk that its failure to perform its obligation might cause injury to innocent third parties, particularly passengers. Consequently, the general agent is under the duty to such parties to save them harmless from that risk. For the negligent breach of that duty the law imposes liability on the agent (*Hudson v. Moonier*, 102 Fed. (2d) 96, 99, C. C. A. 8; *Murray v. Cowherd*, 148 Ky. 591; see also *Osborne v. Morgan*, 130 Mass. 102, 2 Am. Jur., Agency, Section 333, p. 262).

It has been long establish that the right of a ship owner to limit its liability is dependent upon his want of complicity in the acts causing the disaster and the burden of proof rests upon him to show affirmatively that he has properly officered and equipped the vessel for the contemplated service. (*McGill v. Michigan S. S. Co.*, (C. C. A. 9, 1906) 144 Fed. 788; *The Elton*, (C. C. A. 3, 1906) 131 Fed. 562, 142 Fed. 367; *The Cygnet*, (C. C. A. 1, 1903) 126 Fed. 742.

Where competent, careful and safe employees are required to accomplish an undertaking it is negligence on the part of the person procuring and selecting them not to procure and select such persons having such qualifications, which negligence renders them liable to persons for injuries occasioned thereby. (*Shoemaker v. Kingsbury*, 79 U. S. 369; *Holladay v. Kennard*, 79 U. S. 254; *Victo v. Clark*, Fed. Case #10262 (C. C. Mass.); *Gallena v. Hot Springs R. Co.*, 13 Fed. 116. A United States publication *Postal Decisions*, 1939, p. 445 states:

"A postmaster is not responsible for the default or misfeasance of his clerks or assistants unless it be shown that he was *negligent in failing to select suitable and competent persons for such duties, Dunlop v. Monroe*, 11 U. S. 242; *Bolom v. Williamson*, (ac) 2 Bay 551; *Wiggins v. Hathaway*, (N. Y.) 6 Bart 632; *Schroyer v. Lynch*, (Pa.) 8 Watts 453; *Raisler v. Oliver*, 97 Ala. 710; *Keenan v. Southworth*, 110 Mass. 474; or that the postmaster was *negligent in failing to properly supervise* * * *." Where he is negligent in either respect mentioned, he is liable.

Conclusion.

The judgment below should be reversed.

Respectfully submitted,

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